Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-1721

EDWARD T. LYSEK and ISABEL J. LYSEK,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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OPINIONS BELOW

The opinions of the United States Tax Court (hereinafter, "Tax Court") granting the Commissioner of Internal Revenue's (hereinafter, "Commissioner") motion to dismiss the petitions for redetermination are unreported and appear in Appendix A, *infra,* pp. i-iv. The opinion of the Ninth Circuit Court of Appeals remanding the cases is unreported, and appears (with amending order) in Appendix B, *infra,* pp. v-vii.

The subsequent opinions of the Tax Court granting the Commissioner's motions to dismiss are unreported and appear in Appendix C, *infra,* pp. viii-xi. The opinion of the Ninth Circuit Court of Appeals granting the Commissioner's motion for summary affirmance is unreported and appears in Appendix D, *infra,* p. xii.

JURISDICTION OF THE SUPREME COURT

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a). The judgment of the Court of Appeals was entered March 7, 1978.

QUESTIONS PRESENTED

I. Is due process denied or error otherwise committed where the Tax Court dismisses a petition for redetermination of deficiency on grounds of failure to properly prosecute because the petitioning taxpayer has failed to stipulate to facts, where the Tax Court has not given the taxpayer the required opportunity to contest the stipulation requirement, especially where the Tax Court knew that the petitioners would have contested the requirement on the grounds: 1) of their Fifth Amendment privilege against self-incrimination, and 2) that their tax records had been unlawfully seized by the Commissioner and never returned to petitioners?

II. Is due process denied or error otherwise committed, where the Tax Court dismisses a petition for

redetermination of deficiency on grounds of failure to properly prosecute because the petitioning taxpayers have failed to stipulate to facts, since the Tax Court is empowered in such a situation to order that facts specified by the Commissioner be deemed admitted, but is not specifically empowered in such a situation to dismiss the petition?

III. Is due process denied or error otherwise committed, where the Tax Court dismisses a petition for redetermination of deficiency on grounds of failure to properly prosecute because the petitioning taxpayers have failed to stipulate to facts, where the Tax Court has failed to hear or rule upon the taxpayers' motion to continue the order to stipulate, has failed to hear the taxpayers on the issue of their failure to stipulate, and has failed to hear the taxpayers on the Commissioner's motion to dismiss?

IV. Is due process denied, or error otherwise committed, where a United States Court of Appeals summarily affirms an appeal without hearing the appellant orally and where the motion for summary affirmance is submitted to only two judges?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. The Fifth Amendment, United States Constitution:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . . ."

2. Rule 91, Rules of Practice and Procedure, United States Tax Court, set forth in Appendix E, *infra,* pp. xiii-xvii.

3. Rule 50, Rules of Practice and Procedure, United States Tax Court, set forth in Appendix F, *infra,* pp. xviii-xix.

4. Rule 161, Rules of Practice and Procedure, United States Tax Court:

> "Motion for Reconsideration of Findings or Opinion. Any motion for reconsideration of an opinion or findings of fact, with or without a new or further trial, shall be filed within 30 days after the opinion has been served, unless the Court shall otherwise permit."

5. 28 U.S.C. §46(b):

> "In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs."

6. 26 U.S.C. §7453:

> "The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia."

STATEMENT OF THE CASE

On July 8, 1971, petitioners filed with the United States Tax Court their petition for redetermination of their federal income tax deficiency for the calendar year 1967 in the sum of $16,475.18 plus penalties of $823.76. On June 18, 1974, the Tax Court dismissed the petition for failure to properly prosecute, and ordered judgment in the aforesaid amounts. (See Appendix A.)

On July 10, 1972, petitioners filed with the Tax Court their petition for redetermination of their federal income tax deficiencies for the calendar years 1968, 1969 and 1970 in the sum of $175,283.73, plus penalties of $43,820.91 and $8,764.19. On June 18, 1974, the Tax Court dismissed the petition for failure to properly prosecute, and ordered judgment in the aforesaid amounts. (See Appendix A.)

Petitioners appealed to the Ninth Circuit Court of Appeals, and that Court remanded because the petitioners had been misled by grossly erroneous advice. (See Appendix B.)

Upon remand, the Tax Court ordered petitioners to meet on an unspecified date with opposing counsel to enter into a stipulation of facts. Petitioners then moved the Tax Court to remand the case to the Commissioner, or, in the alternative, to continue its order (to confer re stipulation) until the mandate of the Ninth Circuit Court of Appeals could be clarified as to whether, as indicated in its initial Memorandum (see Appendix B), the Court intended the Tax Court to remand to the Commissioner.

The petitioners did not meet with opposing counsel to enter into a stipulation of facts, believing that the Tax Court would first rule on their motion to remand or continue, and believing that at least the Tax Court would follow its own rules by ordering petitioners to show cause why specified facts should not be deemed admitted. The petitioners intended to show that they should not be required to stipulate because of their Fifth Amendment privilege against self-incrimination and because the Commissioner had in June 1971 unlawfully seized their tax records (in a night-time raid on the premises of petitioners' tax accountant) and had never returned them. Both of these issues had been raised in earlier proceedings in the Tax Court.

However, the Tax Court did not rule on the petitioners' motion to remand or continue, and did not order the petitioners to show cause why specified facts should not be deemed admitted, which would have allowed the petitioners to present additional facts at trial and to argue the legal effect of the admitted facts. Instead, the Tax Court granted the Commissioner's motion to dismiss for failure to properly prosecute.

Petitioners then filed, albeit seventeen days late, a motion to vacate or, in the alternative, a notice of appeal. The motion raised again the issues of the privilege against self-incrimination and of the unlawfully seized records. The Tax Court, however, treated the document only as a notice of appeal, although the Court had discretion to consider the motion on its merits. (Rule 161, Rules of Practice and Procedure, United States Tax Court.)

After the petitioners had filed their opening brief on appeal, the Commissioner filed a motion for summary affirmance of the Tax Court decision. That motion was granted without oral hearing by a two-judge panel of the Ninth Circuit Court of Appeals. (See Appendix D.)

JURISDICTION OF THE LOWER COURTS

Jurisdiction of the United States Tax Court was invoked under 26 U.S.C. §7442 and §§6213-6214. Jurisdiction on appeal to the Ninth Circuit Court of Appeals was invoked under 26 U.S.C. §7462.

REASONS FOR GRANTING THE WRIT

1. Summary

This Court should grant the Writ of Certiorari to decide important questions regarding the power of the Tax Court to 1) abridge rights to hearings created by its own rules, 2) impose the ultimate sanction of dismissal, when under its own rules it is authorized only to impose a lesser sanction, and 3) ignore a motion seeking to continue an order for the disobedience of which the Court later imposes the sanction of dismissal. The Writ should also be granted so that this Court can resolve a conflict among the Circuits of the Courts of Appeal regarding whether, in a pro-

ceeding for a tax refund or redetermination of deficiency, dismissal may be imposed upon the failure of a taxpayer to produce evidence on the grounds of the privilege against self-incrimination. Finally, the Writ should be granted so that an important question in the administration of justice can be resolved: whether a panel of only two judges can finally dispose of an appeal on its merits.

2. Departure Of The Tax Court From Its Own Rules

Pursuant to 26 U.S.C. §7453, the United States Tax Court has promulgated its own rules of procedure. Rule 91 requires the parties to stipulate to facts which may be used at trial. That rule further provides that upon refusal or failure of a party to confer regarding stipulations, or upon refusal or failure of a party to stipulate, the opposing party may file a motion for an order directing the delinquent party to show cause why the facts specified in the motion should not be deemed admitted for the purposes of the case. If the delinquent party fails to respond to the motion, or if the response is inadequate, the Tax Court may order that the facts specified in the motion be deemed admitted.

Thus, the Tax Court has comprehensive procedures for dealing with the failure of a party to stipulate. Yet in the present case, the Tax Court wholly ignored these procedures. Upon the petitioners' failure to confer regarding stipulation and their failure to stipulate, the Commissioner did not file a motion pursuant to Rule 91, but instead filed a motion to dismiss. The Tax Court did not order petitioners to show cause

why facts should not be deemed admitted, nor did it order that facts be deemed admitted. The Tax Court did not even order petitioners to show cause why their petition should not be dismissed, and did not rule (as required by Rule 50) on petitioners' motion to continue the Tax Court's order to confer and stipulate. Instead, the Tax Court simply dismissed the petition.

Petitioners were thus denied a Rule 91 hearing, were denied a hearing on the motion to dismiss, were denied a hearing on their own motion, and were denied a trial on the merits of the case. Even if the Tax Court had imposed the sanction authorized by Rule 91 (order deeming facts admitted), petitioners could still have appeared at trial to present additional evidence and to argue the legal effect of the facts deemed admitted.

3. The Propriety Of Dismissal As A Response To Assertion Of The Privilege Against Self-Incrimination

The prejudice inherent in the denials of hearing was compounded because, as petitioners had informed the Tax Court through their pleadings and motions, the petitioners intended to assert their Fifth Amendment privilege against self-incrimination and intended to prove that their tax records for the years in question had been unlawfully seized by the Commissioner and never returned to petitioners.

The Tax Court may have believed that petitioners had no privilege against self-incrimination assertible in the Tax Court, on the basis of *Haman v. C.I.R.* (CA9, 1974) 500 F.2d 401, and *Figueiredo v. Com-*

missioner (1970) 54 T.C. 1508, aff. in an unreported order (CA9, Nov. 4, 1973). But in those cases, the issue was whether the self-incrimination privilege could relieve taxpayers of their burden of proof at trial. Petitioners here do not raise that issue. They were prepared to meet their burden of proof at trial.

To the extent that *Haman* and *Figueiredo* may be read as reflecting the Ninth Circuit Court of Appeals' view that taxpayers seeking redetermination of deficiencies cannot decline to produce evidence on grounds of their privilege against self-incrimination, then there is a conflict among circuits. The Courts of Appeals for the Third, Fourth and Fifth Circuits have held that in a suit for refund of Federal wagering taxes, dismissal of the suit is not a proper response to a refusal to produce evidence on grounds of the privilege against self-incrimination. Rather, the taxpayer should be granted immunity or the proceedings should be stayed until criminal action is terminated or the applicable statutes of limitation have run. *Thomas v. United States* (CA5, 1976) 531 F.2d 746, 749; *Shaffer v. United States* (CA4, 1975) 528 F.2d 920; *Ianelli v. Long* (CA3, 1973) 487 F.2d 317, cert. den. 94 S.Ct. 541.

By granting the Writ of Certiorari, this Court can determine for all circuits the issue of whether, in a proceeding for a tax refund or a redetermination of deficiency, dismissal is a proper response to a failure to produce evidence on grounds of the privilege against self-incrimination.

4. Disposition Of An Appeal On Its Merits By A Two-Judge Panel

The final reason that this Court should grant the Writ of Certiorari is to determine the propriety of summary affirmance without oral argument by a two-judge panel of a Court of Appeals.

The failure of a Court of Appeals to allow oral argument may not in itself constitute a denial of due process. See *National Labor Relations Board v. Local #42* (CA3, 1973) 476 F.2d 275. But such failure coupled with final disposition of a case on its merits by a panel of only two judges may constitute such violation, and certainly contravenes statutory provisions. 28 U.S.C. §46(b) provides that three judges shall determine each case. Yet here, the Commissioner's motion for summary affirmance was heard by only two judges. Admittedly, since the two judges concurred, they could have out-voted any third judge. But if there had been three judges, the discussion among them might well have resulted in a different majority opinion. And certainly where oral argument is denied, every precaution should be taken to assure that an appellant's rights are not further abridged.

Because of the pressures of increased caseloads, such summary disposition as was employed in this case will certainly be appealing to the Courts of Appeal. This Court by granting the Writ can decide this important question in the administration of justice before the practice becomes so widespread that disapproval would upset many cases already decided.

CONCLUSION

For the reasons aforesaid, petitioners respectfully pray this Court to issue a Writ of Certiorari to review the judgment of the Ninth Circuit Court of Appeals.

Dated, San Francisco, California,
June 1, 1978.

Respectfully submitted,
JOHN R. BERNARD,
STOKES, CLAYTON & MCKENZIE,
Counsel for Petitioners.

(Appendices Follow)

Appendices

Appendix A

United States Tax Court

Docket No. 4827-71

Edward T. Lysek and Isabel J. Lysek,	Petitioners,
vs.	
Commissioner of Internal Revenue,	Respondent.

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar of the Court at San Francisco, California on June 10, 1974, for a pre-trial conference, pursuant to the Court's order dated May 8, 1974. There was no appearance by or on behalf of the petitioners, and counsel for the respondent orally moved that this case be dismissed for failure to properly prosecute in that the petitioners failed to comply with the Court's order dated May 8, 1974. After due consideration and for cause appearing in the transcript of the proceedings, it is

ORDERED that respondent's oral motion is granted, and this case is dismissed for failure to properly prosecute. It is further

ORDERED and DECIDED that there is a deficiency in income tax and an addition to the tax under section 6653(a) of the Internal Revenue Code of 1954

due from the petitioners for the taxable year 1967 in the respective amounts of $16,475.18 and $823.76.

B. M. Forrester
Judge

Entered: Jun 18 1974

United States Tax Court

Docket No. 5545-72

Edward T. Lysek and Isabel J. Lysek,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar of the Court at San Francisco, California on June 10, 1974, for a pre-trial conference, pursuant to the Court's order dated May 8, 1974. There was no appearance by or on behalf of the petitioners, and counsel for the respondent orally moved that this case be dismissed for failure to properly prosecute in that the petitioners failed to comply with the Court's order dated May 8, 1974. After due consideration and for cause appearing in the transcript of the proceedings, it is

ORDERED that respondent's oral motion is granted, and this case is dismissed for failure to properly prosecute. It is further

ORDERED and DECIDED that there are deficiencies in income taxes and additions to the taxes due from the petitioners as follows:

Taxable Year	Deficiency
1968	$68,244.37
1969	78,218.77
1970	28,820.59

	Additions to the tax under the Internal Revenue Code of 1954		
Taxable Year	Section 6651(a)(1)	Section 6651(a)(3)	Section 6653(a)
1968	$17,061.09	$ —	$3,412.22
1969	19,554.69	—	3,910.94
1970	6,484.63	720.51	1,441.03

B. M. Forrester
Judge

Entered: Jun 18 1974

Appendix B

United States Court of Appeals
for the Ninth Circuit

Noel L. Bixel and Marilyn Bixel, Petitioners-Appellants, vs. Commissioner of Internal Revenue, Respondent-Appellee.	No. 74-3482 4654-74
Verl M. Leishman and Lois L. Leishman, Fred A. Brown and Sue M. Brown, et al. Petitioners-Appellants, vs. Commissioner of Internal Revenue, Respondent-Appellee.	No. 74-3493 4527-71, 4547-71, 4536-71, 4584-73, 4575-71, 4798-71, 4827-71, 5545-72, 6049-71, 3758-73, 4044-73

[Filed December 23, 1975]

On Appeal from the United States Tax Court

MEMORANDUM

Before: ELY, HUFSTEDLER and GOODWIN,
Circuit Judges

The petitions of the above-named taxpayers were all dismissed by the Tax Court pursuant to the Tax Court's rules, and taxpayers have appealed to this Court. It appears that all of the appellants followed

the tax advice of two grossly incompetent individuals who held themselves forth as income tax advisors in Mendocino County, California. The catalog of malpractice is too extensive to recount here, but it is clear that the above-named taxpayers were misled in many cases with disastrous results.

In the interest of justice, the above cases are all remanded to the Commissioner for consideration of the books and records of the taxpayers which previously were not submitted by the taxpayers because of the grossly erroneous advice upon which they relied.

United States Court of Appeals
for the Ninth Circuit

Noel L. Bixel and Marilyn Bixel, Petitioners-Appellants, vs. Commissioner of Internal Revenue, Respondent-Appellee.	No. 74-3482 4654-74
Verl M. Leishman and Lois L. Leishman, Fred A. Brown and Sue M. Brown, et al. Petitioners-Appellants, vs. Commissioner of Internal Revenue, Respondent-Appellee.	No. 74-3493 4527-71, 4547-71, 4536-71, 4584-73, 4575-71, 4798-71, 4827-71, 5545-72, 6049-71, 3758-73, 4044-73

[Filed March 10, 1976]

On Appeal from the United States Tax Court

ORDER

Before: ELY, HUFSTEDLER and GOODWIN,
Circuit Judges

The Memorandum of December 23, 1975, is amended to remand the cause to the Tax Court rather than to the Commissioner.

Appendix C

United States Tax Court
Washington, D.C. 20217

Docket No. 4827-71

Edward T. Lysek and Isabel J. Lysek,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

ORDER OF DISMISSAL AND DECISION

On January 17, 1977, counsel for respondent filed a Status Report and a Motion to Dismiss for Failure to Properly Prosecute in this case. Petitioners have not complied with the Court's Order dated November 15, 1976, in any respect. Upon consideration of the aforesaid documents filed on January 17, 1977, and the record in this case in its entirety, it is

ORDERED that respondent's Motion to Dismiss filed on January 17, 1977, is granted and this case is herewith dismissed for failure properly to prosecute. It is further

ORDERED AND DECIDED that there is a deficiency in income tax and an addition to the tax under Section 6653(a) of the Internal Revenue Code

of 1954, as amended, due from petitioners for the taxable year 1967 in the respective amounts of $16,475.18 and $823.76.

/s/ Howard A. Dawson, Jr.
Chief Judge

Enter: Entered Mar 1, 1977

United States Tax Court
Washington, D.C. 20217

Docket No. 5545-72

Edward T. Lysek and Isabel J. Lysek,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

ORDER OF DISMISSAL AND DECISION

On January 17, 1977, counsel for respondent filed a Status Report and a Motion to Dismiss for Failure to Properly Prosecute in this case. Petitioners have not complied with the Court's Order of November 15, 1976, in any respect. Upon consideration of the aforesaid documents filed on January 17, 1977, and the record in this case in its entirety, it is

ORDERED that respondent's Motion to Dismiss filed on January 17, 1977, is granted and this case is herewith dismissed for failure to properly prosecute. It is further

ORDERED AND DECIDED that there are deficiencies in income taxes and additions to the taxes due from the petitioners as follows:

Taxable Year Ended	Deficiency in Income Tax	Additions to the Tax IRC 1954, as Amended		
		Section 6651(a)(1)	Section 6651(a)(3)	Section 6653(a)
1968	$68,244.37	$17,061.09	$ —	$3,412.22
1969	78,218.77	19,554.69	—	3,910.94
1970	28,820.59	6,484.63	720.51	1,441.03

/s/ Howard A. Dawson, Jr.
Chief Judge

Enter: Entered Mar 1, 1977

Appendix D

United States Court of Appeals
for the Ninth Circuit

No. 77-2819

Edward T. and Isabel J. Lysek, Petitioners-Appellants, vs. Commissioner of Internal Revenue, Respondent-Appellee.	Tax Court Nos. 4827-71 & 5545-72

[Filed Mar 7, 1978]

ORDER

Before: GOODWIN and TANG, Circuit Judges.

Upon due consideration, appellee's motion for summary affirmance is hereby granted. Appellants have failed to carry their burden of showing that the Tax Court's Order of Dismissal and Decision was not within the "permissible range" of its discretionary power. See *Montgomery v. Commissioner,* 367 F.2d 917 (9th Cir. 1966).

/s/ Thomas Tang
/s/ Alfred T. Goodwin
United States Circuit Judges

Appendix E

RULE 91. STIPULATIONS FOR TRIAL

(a) Stipulations Required: (1) *General:* The parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact. Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, and all evidence which fairly should not be in dispute. Where the truth or authenticity of facts or evidence claimed to be relevant by one party is not disputed, an objection on the ground of materiality or relevance may be noted by any other party but is not to be regarded as just cause for refusal to stipulate. The requirement of stipulation applies under this Rule without regard to where the burden of proof may lie with respect to the matters involved. Documents or papers or other exhibits annexed to or filed with the stipulation shall be considered to be part of the stipulation.

(2) *Stipulations To Be Comprehensive:* The fact that any matter may have been obtained through discovery or requests for admission or through any other authorized procedure is not ground for omitting such matter from the stipulation. Such other procedures should be regarded as aids to stipulation, and matter obtained through them which is within the

scope of paragraph (1), must be set forth comprehensively in the stipulation, in logical order in the context of all other provisions of the stipulation.

(b) Form: Stipulations required under this Rule shall be in writing, signed by the parties thereto or by their counsel, and shall observe the requirements of Rule 23 as to form and style of papers, except that the stipulation shall be filed with the Court in duplicate and only one set of exhibits shall be required. Documents or other papers, which are the subject of stipulation in any respect and which the parties intend to place before the Court, shall be annexed to or filed with the stipulation. The stipulation shall be clear and concise. Separate items shall be stated in separate paragraphs, and shall be appropriately lettered or numbered. Exhibits attached to a stipulation shall be numbered serially, i.e., 1, 2, 3, etc., if offered by the petitioner; shall be lettered serially, i.e., A, B, C, etc., if offered by the respondent; and shall be marked serially, i.e., 1-A, 2-B, 3-C, etc., if offered as joint exhibits.

(c) Filing: Executed stipulations prepared pursuant to this Rule, and related exhibits, shall be filed by the parties at or before commencement of the trial of the case, unless the Court in the particular case shall otherwise specify. A stipulation when filed need not be offered formally to be considered in evidence.

(d) Objections: Any objection to all or any part of a stipulation should be noted in the stipulation, but the Court will consider any objection to a stipulated

matter made at the commencement of the trial or for a good cause shown made during the trial.

(e) Binding Effect: A stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the Court or agreed upon by those parties. The Court will not permit a party to a stipulation to qualify, change, or contradict a stipulation in whole or in part, except that it may do so where justice requires. A stipulation and the admissions therein shall be binding and have effect only in the pending case and not for any other purpose, and cannot be used against any of the parties thereto in any other case or proceeding.

(f) Noncompliance by a Party: (1) *Motion to Compel Stipulation:* If, at the date of issuance of trial notice in a case, a party has refused or failed to confer with his adversary with respect to entering into a stipulation in accordance with this Rule, or he has refused or failed to make such a stipulation of any matter within the terms of this Rule, the party proposing to stipulate may, at a time not earlier than 75 days and not later than 50 days prior to the date set for call of the case from a trial calendar, file a motion with the Court for an order directing the delinquent party to show cause why the matters covered in the motion should not be deemed admitted for the purposes of the case. The motion shall (i) show with particularity and by separately numbered paragraphs each matter which is claimed for stipulation; (ii) set forth in express language the specific stipulation

which the moving party proposes with respect to each such matter and annex thereto or make available to the Court and the other parties each document or other paper as to which the moving party desires a stipulation; (iii) set forth the sources, reasons, and basis for claiming, with respect to each such matter, that it should be stipulated; (iv) show that opposing counsel or the other parties have had reasonable access to those sources or basis for stipulation and have been informed of the reasons for stipulation; and (v) show proof of service of a copy of the motion on opposing counsel or the other parties.

(2) *Procedure:* Upon the filing of such a motion, an order to show cause as moved shall be issued forthwith, unless the Court shall direct otherwise. The order to show cause will be served by the Clerk of the Court, with a copy thereof sent to the moving party. Within 20 days of the service of the order to show cause, the party to whom the order is directed shall file a response with the Court, with proof of service of a copy thereof on opposing counsel or the other parties, showing why the matters set forth in the motion papers should not be deemed admitted for purposes of the pending case. The response shall list each matter involved on which there is no dispute, referring specifically to the numbered paragraphs in the motion to which the admissions relate. Where a matter is disputed only in part, the response shall show the part admitted and the part disputed. Where the responding party is willing to stipulate in whole or in part with respect to any matter in the motion

by varying or qualifying a matter in the proposed stipulation, the response shall set forth the variance or qualification and the admission which the responding party is willing to make. Where the response claims that there is a dispute as to any matter in part or in whole, or where the response presents a variance or qualification with respect to any matter in the motion, the response shall show the sources, reasons and basis on which the responding party relies for that purpose. The Court, where it is found appropriate, may set the order to show cause for a hearing or conference at such time as the Court shall determine.

(3) *Failure of Response:* If no response is filed within the period specified with respect to any matter or portion thereof, or if the response is evasive or not fairly directed to the proposed stipulation or portion thereof, that matter or portion thereof will be deemed stipulated for purposes of the pending case, and an order will be entered accordingly.

(4) *Matters Considered:* Opposing claims of evidence will not be weighed under this Rule unless such evidence is patently incredible. Nor will a genuinely controverted or doubtful issue of fact be determined in advance of trial. The Court will determine whether a genuine dispute exists, or whether in the interests of justice a matter ought not be deemed stipulated.

Appendix F

TITLE V. MOTIONS

RULE 50. GENERAL REQUIREMENTS

(a) Form and Content of Motion: An application to the Court for an order shall be by motion in writing, which shall state with particularity the grounds therefor and shall set forth the relief or order sought. If there is no objection to a motion in whole or in part, the absence of such objection shall be stated on the motion, preferably over the signature of the other party or his counsel. Unless the Court directs otherwise, motions made during a hearing or trial need not be in writing. The rules applicable to captions, signing, and other matters of form and style of pleadings apply to all motions. See Rules 23, 32, and 33.

(b) Disposition of Motions: A motion may be disposed of in one or more of the following ways, in the discretion of the Court:

(1) The Court may take action after directing that a written response be filed. In that event, the motion shall be served upon the opposing party, who shall file such response within such period as the Court may direct. Written response to a motion shall conform to the same requirements of form and style as apply to motions.

(2) The Court may take action after directing a hearing, which normally will be held in Washington, D.C. The Court may, on its own motion or upon the written request of any party to the motion, direct

that the hearing be held at some other location which serves the convenience of the parties and the Court.

(3) The Court may take such action as the Court in its discretion deems appropriate, on such prior notice, if any, which the Court may consider reasonable. The action of the Court may be taken with or without wrtten response, hearing, or attendance of a party to the motion at the hearing.

(c) Attendance at Hearings: If a motion is noticed for hearing, a party to the motion may, prior to or at the time for such hearing, submit a written statement of his position together with any supporting documents. Such statement may be submitted in lieu of or in addition to attendance at the hearing.

(d) Defects in Pleading: Where the motion or order is directed to defects in a pleading, prompt filing of a proper pleading correcting the defects may obviate the necessity of a hearing thereon.

(e) Postponement of Trial: The filing of a motion shall not constitute cause for postponement of a trial. With respect to motions for continuance, see Rule 134.

(f) Service of Motions: The rules applicable to service of pleadings apply to service of motions. See Rule 21.

Supreme Court, U. S.
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No. 77-1721

In the Supreme Court of the United States

OCTOBER TERM, 1978

EDWARD T. LYSEK AND ISABEL J. LYSEK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The question presented in this federal income tax case is whether the Tax Court properly dismissed petitioners' action for failure to prosecute their case.

The dismissal occurred approximately six years after petitioners commenced this litigation in the Tax Court, for redetermination of deficiencies determined for 1967-1970 (R. 1, 4, 12, 15, 55-58, 114-119).[1] Their petition, however, did not specify that the Commissioner's determination was based upon any specific factual or legal errors, but rather generally alleged that the deficiencies were "excessive and without a rational foundation" (R. 1-2). Thereafter, the Tax Court ordered petitioners to

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[1] "R." refers to the record appendix in the court of appeals.

attend a pretrial conference for the purpose of "narrowing issues." This order specifically warned petitioners that their unjustified failure to attend that conference could result in a dismissal of their suit and entry of a decision against them (R. 37-38, 47-48). Petitioners nevertheless failed to appear at the conference and the Tax Court dismissed their suit for failure to prosecute (Pet. App. A, pp. i-iv). The court of appeals reversed (Pet. App. B). It stated that "[i]t appears that all of the appellants followed the tax advice of two grossly incompetent individuals" whose "catalog of malpractice is too extensive to recount here * * *" (Pet. App. B, pp. v-vi). It therefore remanded the case to the Tax Court "[i]n the interests of justice * * * for consideration of the books and records of the taxpayers which previously were not submitted by the taxpayers because of the grossly erroneous advice upon which they relied" (Pet. App. B, pp. vi-vii).

On remand, the Tax Court ordered petitioners to meet with counsel for the Commissioner and to bring with them "all of their books and records which show, or which may be claimed to show, that they are entitled to the adjustments at issue" (R. 37, 47). Petitioners took no action to meet with counsel for the Commissioner or to prepare their case for trial. Their only action on remand was to file a series of motions in the Tax Court reiterating their claims that the deficiency notices here were "without a rational foundation" (R. 86); that they were "under no obligation to show either the Tax Court or the Commissioner any other correct tax than the petitioner's [*sic*] self-assessment", that any attempt by the Tax Court to force them to divulge their books and records would constitute "a flagrant grab of power not vested in the Tax Court * * * and a display of arrogant and abusive bias and prejudice for the Commissioner" (R. 86-88); that any attempt by the Commissioner to examine or any

proceeding that required them to divulge their books and records would violate their Fifth Amendment privilege against compulsory self-incrimination (R. 103-105); and that the Tax Court should remand their cases to the Commissioner (R. 89-90). After it became apparent that petitioners were unwilling to proceed to trial, the Tax Court dismissed their action for failure properly to prosecute (Pet. App. C, pp. viii-xi). The court of appeals affirmed by order (Pet. App. D, p. xii).

The Tax Court's order of dismissal was proper. It is well established that a trial court has discretion to dismiss a suit when the moving party fails properly to prosecute the action he initiated. *Link* v. *Wabash Railroad Co.*, 370 U.S. 626; *Montgomery* v. *Commissioner*, 367 F. 2d 917 (C.A. 9). Petitioners were granted two opportunities to prosecute their action for a redetermination of income tax deficiencies, and twice declined to do so. Accordingly, they cannot complain that their action was dismissed as a result.

Contrary to petitioners' argument (Pet. 8-9), Rule 91 of the Rules of Practice and Procedure of the United States Tax Court does not establish a mandatory procedure that compels a party willing to enter into a stipulation to file a motion requiring the opposing party to show cause why the matters covered should not be deemed admitted for purposes of the case, nor does it require that the Tax Court hold a hearing if such a motion is actually filed. Moreover, Rule 50(b) of the Tax Court's Rules does not, as petitioners urge (Pet. 9), require the court to hold a hearing prior to dismissing a case for failure to prosecute. That rule provides that the court shall take such action as it deems appropriate in accordance with its discretion (see Pet. App. F, p. xix).

Finally, petitioners err in invoking thier Fifth Amendment privilege against compulsory self-incrimination as a bar to the Tax Court's dismissal of their suit.[2] This Court has repeatedly held that the constitutional protection accorded by the Fifth Amendment is designed to "[protect] against real dangers, not remote and speculative possibilities." *E.g., Zicarelli* v. *New Jersey Investigation Comm'n*, 406 U.S. 472, 478; *Marchetti* v. *United States*, 390 U.S. 39, 48; *Hoffman* v. *United States*, 341 U.S. 479, 486; *Rogers* v. *United States*, 340 U.S. 367, 372-373. Petitioners have not alleged any fact that would support a finding that their production of books and records might place them in danger of legal detriment. On the contrary, all that is before the court is their blanket claim that opening their books and records would produce that result. Such claims cannot insulate them from a requirement that they produce books and records or suffer the dismissal of their suit. *United States* v. *Theep*, 502 F. 2d 797 (C.A.9); *United States* v. *Cromer*, 483 F. 2d 99 (C.A.9); *United States* v. *Bell*, 448 F. 2d 40 (C.A. 9); *United States* v. *Roundtree*, 420 F. 2d 845, 852 (C.A. 5). See also *Figueiredo* v. *Commissioner*, 54 T.C. 1508, affirmed by order, March 14, 1973 (C.A. 9) (No. 71-1139) (73-2 U.S.T.C. para. 9713).[3]

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[2]For the first time, petitioners allege (Pet. 9) that "their tax records * * * had been unlawfully seized by the Commissioner and never returned to petitioners." This claim is not supported by the record. An affidavit executed in an unrelated litigation alleged that the Commissioner seized certain records in the possession of petitioners' accountant. However, nothing in the record establishes that anything belonging to petitioners was taken in this alleged seizure. Moreover, even assuming the correctness of the allegations of the affidavit, petitioners' Fifth Amendment rights would not have been violated. *Fisher* v. *United States*, 425 U.S. 391; *Andresen* v. *Maryland*, 427 U.S. 463.

[3]There is also no merit in petitioners' argument (Pet. 11) that two judges of the court of appeals could not review the Tax Court's dismissal. A two-judge panel constitutes a quorum for adjudicating appellate cases. See 28 U.S.C. 46(d). Moreover, the court has the discretion to determine in each case whether oral argument shall be heard. *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 272-284.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1978.